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EXAMINER

BECKER, DREW E

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1761

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Application Number: 09/909,913
Filing Date: July 20, 2001
Appellant(s): ANDERS ET AL.

MAILED

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GROUP 1700

Dennis B. Brown
For Appellant

EXAMINER'S ANSWER

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

This is in response to the appeal brief filed November 17, 2005 appealing from the
Office action mailed April 15, 2005.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

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(3) Status of Claims

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 1-20, 27-42, and 92-103.

Claims 4-5 and 30 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

Claims 4-5 and 30 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

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(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows:

Dependent claims 4-5 and 30 are no longer rejected in view of the prior art.

Claims 4-5 and 30 objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. The following is a statement of reasons for the indication of allowable subject matter: the method of treating food items having individual muscle protein fibers at least partially covered by a collagen protein layer of dependent claim 4 defines over the prior art of record because the prior art does not teach, suggest, nor render obvious the first and second surfaces completely surrounding the food items in the pressing step; the method of treating food items having individual muscle protein fibers at least partially covered by a collagen protein layer of dependent claims 5 and 30 define over the prior art of record because the prior art does not teach, suggest, nor render obvious the first layer being a covering for a plunger and the second layer being an interior cavity wherein the plunger is receivable for pressing the food items. The examiner contacted the appellant's attorney on/about September 1, 2005 with a proposed examiner's amendment incorporating these changes. However, appellant's attorney indicated that they would prefer to proceed with the appeal process.

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Furthermore, the rejection based upon Klaasen has been dropped because it does not add anything beyond that which is taught by the other references, specifically Peterson et al.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

Furthermore, the rejection based upon Klaasen has been dropped because it

4,467,497 Peterson et al 8-1984 does not add anything beyond that which is taught by the other references, specifically,

5,082,678 Margolis 1-1992

4,657,771 Gould 4-1987

5,564,332 Ludwig 10-1996

3,347,679 Nordin 10-1967

GB 957,356 Wittig 5-1964

(9) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official

(9) Grounds of Rejection

Notice The following ground(s) of rejection are applicable to the appealed claims:

4,467,497 Peterson et al 8-1984

5,082,678 Margolis 1-1992

4,657,771 Gould 4-1987

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Election/Restriction

1. This application contains claims 8, 12-13, 28, 35-36, 95-96, and 102 are drawn to an invention nonelected without traverse in the response of August 16, 2004. A complete reply to the final rejection must include cancellation of nonelected claims or other appropriate action (37 CFR 1.144) See MPEP 821.01.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

3. Claims 1-3, 6-7, and 10 are rejected under 35 U.S.C. 102(b) as being anticipated by Peterson et al [Pat. No. 4,467,497].

Peterson et al teach a method of treating foods by pressing meat between two pliable surfaces (Figure 1, #6 & 12; column 2, line 35) which at least partially surround the

meat, first and second surfaces (Figure 1, #7 & 13), successive rollers providing a

series of presses (Figure 1, #5 & 11), and the pliable rubber belts also conform to the

meat to at least some small degree when passing the pairs of rollers, as well as when

passing through the spaces between the pairs of rollers where the meat would push the

belts outward in an attempt to expand back to its unpressed thickness. The pliable belts

by Peterson et al [Pat. No. 4,467,497]

Peterson et al teach a method of treating foods by pressing meat between two pliable

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of Peterson et al would have inherently ruptured the meat collagen due to the use of identical materials and method steps as those claimed by applicant.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1-3, 6-7, 9-11, 27, 29, 31-34, 92-94, 101, and 103 are rejected under 35 U.S.C. 103(a) as being unpatentable over Margolis [Pat. No. 5,082,678] in view of Peterson et al.

Margolis teaches a method of treating foods by pressing boneless meats (column 4, line 52 to column 5, line 19), infusing a liquid into the meat (column 6, lines 5-28), a pressure of 2.5-12.0 psi (column 5, lines 10-19), the pressing means including rolling devices and pressure plates (column 4, line 52 to column 5, line 19), dipping the meat in the infusing liquid (column 6, lines 5-28), multiple presses (column 7, line 50), and applying pressure during infusion (column 6, line 26). Margolis does not recite two pliable conveyor belt surfaces, and the belts being at least 1/2" thick. Peterson et al teach a method of treating foods by pressing meat between two pliable surfaces (Figure 1, #6 & 12; column 2, line 35) which at least partially surround the meat, first and second surfaces (Figure 1, #7 & 13), successive rollers providing a series of presses (Figure 1,

Margolis teaches a method of treating foods by pressing boneless meats (column 4, line 52 to column 5, line 19), infusing a liquid into the meat (column 6, lines 5-28), a pressure of 2.5-12.0 psi (column 5, lines 10-19), the pressing means including rolling devices and pressure plates (column 4, line 52 to column 5, line 19), dipping the meat in the infusing liquid (column 6, lines 5-28), multiple presses (column 7, line 50), and applying pressure during infusion (column 6, line 26).

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#5 & 11), and the pliable rubber belts also conform to the meat to at least some small degree when passing the pairs of rollers, as well as when passing through the spaces between the pairs of rollers where the meat would push the belts outward in an attempt to expand back to its unpressed thickness. The pliable belts of Peterson et al would have inherently ruptured the meat collagen due to the use of identical materials and method steps as those claimed by applicant. It would have been obvious to one of ordinary skill in the art to incorporate the pliable belts and rollers of Peterson et al into the invention of Margolis since both are directed to methods of pressing meat, since Margolis already included a pressing step which could be carried out by any means which was economical and efficient (column 4, line 52) and rollers in particular (column 4, line 58), since the automated belts and rollers of Peterson et al would have provided a more economical and efficient means for pressing as compared to the manual roller pressing of Margolis, and since plural rollers of Peterson et al would have provided multiple presses and thus forced the heated meat of Margolis to exude more juices. It would have been obvious to one of ordinary skill in the art to provide belts at least 1/2" thick in the method of Peterson et al since belts were commonly made in this thickness, since Peterson et al simply did not state the thickness of the belts, and since a thick belt would have provided added durability and a longer service life. MPEP 2144.04 states: In re Rose, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" where held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over prior art). Peterson et al would have provided a similar improvement over Margolis, and since plural rollers of Peterson et al would have provided multiple presses, it would have been obvious to one of ordinary skill in the art to provide belts at least 1/2"

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distinguish over the prior art.); In re Rinehart, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if such were the case, would not establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). In Gardner v. TEC Systems, Inc., 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

6. Claims 14, 18, 37, 40, 97, and 99 are rejected under 35 U.S.C. 103(a) as being unpatentable over Margolis, in view of Peterson et al, as applied above, and further in view of Gould [Pat. No. 4,657,771]. Margolis and Peterson et al teach the above mentioned concepts. Margolis and Peterson et al do not recite impacting the meat during infusion and spiral flites. Gould teaches a method of treating meat by infusing it with liquid while impacting it with spiral flites (Figure 1, #24). It would have been obvious to one of ordinary skill in the art to incorporate the spiral flites of Gould into the invention of Margolis, in view of Peterson et al, since all are directed to methods of treating meat, since Margolis teaches using any means for infusion (column 6, line 5), and since the spiral flites of Gould provided advantages such as minimal bruising, uniform color and brine uptake, as well as minimal time requirements (column 2, line 62 to column 3, line 21).

7. Claims 19-20, 41-42, and 100 are rejected under 35 U.S.C. 103(a) as being unpatentable over Margolis and Peterson et al teach the above mentioned concepts. Margolis and Peterson et al do not recite impacting the meat during infusion and spiral flites. Gould teaches a method of treating meat by infusing it with liquid while impacting it with spiral

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unpatentable over Margolis, in view of Peterson et al and Gould, as applied above, and further in view of Ludwig [Pat. No. 5,544,332].

Margolis, Peterson et al, and Gould teach the above mentioned concepts. Margolis, Peterson et al, and Gould do not recite a paddle rotating opposite the spiral flites.

Ludwig teaches a method of infusing meat with rotating paddles (Figure 6, #57) and the paddles operating in either direction (abstract). It would have been obvious to one of ordinary skill in the art to incorporate the paddles of Ludwig into the invention of

Margolis, in view of Peterson et al and Gould, since all are directed to methods of treating meat, since Margolis teaches using any means for infusion (column 6, line 5), since Gould already included spiral flites (Figure 1, #24), and since the reversible paddles of Ludwig provided a convenient means for emptying the vessel (abstract) while also providing added impacts to the meat to improve infusion.

8. Claims 14-16 and 37-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Margolis, in view of Peterson et al, as applied above, and further in view of Nordin [Pat. No. 3,347,679].

Margolis and Peterson et al teach the above mentioned concepts. Margolis and Peterson et al do not recite a submerged conveyor, impacting during infusion, and at least one pound of liquid per pound of meat. Nordin teaches a method of infusing meat by using a submerged conveyor (Figure 1, #14 & 16) and several times more liquid than meat (Figure 1, #8 & 10). It would have been obvious to one of ordinary skill in the art to incorporate the submerged conveyor of Nordin into the invention of Margolis, in view of Peterson et al, since all are directed to methods of treating meat, since Margolis

Claims 14-16 and 37-38 are rejected under 35 U.S.C. 103(a) as being

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teaches using any means for infusion (column 6, line 5), and since the submerged conveyor of Nordin provided more even distribution of liquid and quicker curing time (column 1, lines 56-60).

9. Claims 17, 39, and 98 are rejected under 35 U.S.C. 103(a) as being unpatentable over Margolis, in view of Peterson et al and Nordin, as applied above, and further in view of GB 957356.

Margolis, Peterson et al, and Nordin teach the above mentioned concepts. Margolis, Peterson et al, and Nordin do not recite flexible fingers. GB 957356 teaches a method of treating meat by impacting it with flexible fingers (Figure 4, #5). It would have been obvious to one of ordinary skill in the art to incorporate the flexible fingers of GB 957356 into the invention of Margolis, in view of Peterson et al and Nordin, since all are directed to methods of treating meat, since Margolis teaches using any means for infusion (column 6, line 5), since Nordin already included impacting fingers (Figure 1, #18), and since GB 957356 teaches that flexible fingers were more effective than stiff fingers (page 1, lines 26-75).

further in view of GB 957356.

Margolis, Peterson et al, and Nordin teach the above mentioned concepts. Margolis,

(10) Response to Argument

Appellant argues that none of the references teach a "pliable material which conforms to and at least partially surrounds" the food. However, Peterson et al teach two belts (Figure 1, #6 & 12) made from rubber or plastic (column 2, lines 33-39). Rubber was commonly known to be pliable, and would have conformed to the food to at least some small degree during pressing with the rollers. Also, the meat would push the rollers apart. GB 957356 teaches that flexible fingers were more effective than stiff fingers (page 1, lines 26-75).

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belts outward in an attempt to expand back to its unpressed thickness when passing through the spaces between the pairs of rollers where there is no pressing action.

Furthermore, the rubber belts of Peterson et al "at least partially" surrounded the food by enclosing it from both above and below.

Appellant argues that none of the references teach two pliable surfaces.

However, Peterson et al clearly teaches two flexible belts (Figure 1, #6 & 12).

Appellant argues that none of the references teach forming openings in the collagen protein layer. However, this was an inherent effect of Peterson et al due to their use of the same materials and process steps as those claimed by the appellant.

Applicant argues that none of the references teach a pressure of 2-120 psi.

However, Margolis clearly teaches a pressure of 2.5-12.0 psi (column 5, line 10).

Appellant argues that none of the references teach a thickness of at least $\frac{1}{2}$ " for the pliable surface. However, it would have been obvious to one of ordinary skill in the art to provide belts at least $\frac{1}{2}$ " thick in the method of Peterson et al since belts were commonly made in this thickness, since Peterson et al simply do not state the thickness of the belts, and since a thick belt would have provided added durability and a longer service life. MPEP 2144.04 states: In re Rose, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" were held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); In re Rinehart, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being the pliable surface. However, it would have been obvious to one of ordinary skill in the

art to provide belts at least $\frac{1}{2}$ " thick that can be used in the method of Peterson et al.

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scaled up, if such were the case, would not establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). In *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Appellant argues that none of the references teach two pliable surfaces in the form of continuous belts. However, Peterson et al clearly teaches two flexible belts (Figure 1, #6 & 12).

Appellant argues that none of the references teach plural pressure applications.

However, Peterson et al clearly teaches two flexible belts (Figure 1, #6 & 12) which are pressed against the food by plural rollers (Figure 1, #5 & 11).

Appellant argues that none of the references teach infusing a treatment liquid after pressing. However, Margolis clearly teaches infusing a liquid into meat products after they have been pressed (column 6, lines 5-28).

Appellant argues that none of the references teach impacting the food with flexible fingers. However, GB 957356 clearly teaches flexible fingers (Figure 4, #5).

Argument 1.0

Appellant argues that Peterson et al had a different goal, or purpose, from that of the appellant. However, Peterson et al teaches all of the claim limitations and inherently

after pressing. However, Margolis clearly teaches infusing a liquid into meat products

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would have had all of the same effects and properties as the claimed method. Claim 1 does not include any limitations pertaining to the infusion of liquid, it essentially requires only the pressing of a food product using a pliable material. Appellant also objects to the term "mangled" in Peterson et al. However, it is clear from the figures of Peterson et al that the meat products (Figure 1, #18) are being pressed by progressively closer rollers and belts (Figure 1, #5-6 & 11-12).

Appellant argues that the belts of Peterson et al were not "pliable", did not "conform" to the food, and did not "at least partially" surround the food item. However, this is clearly not the case. Pliable is defined as "supple enough to bend freely or repeatedly without breaking" [Merriam Webster's Collegiate Dictionary, 10th Edition].

The belts of Peterson et al were made from materials such as rubber and plastic which were clearly pliable because the belts are wrapped around rollers for repeated use (Figure 1, #6 & 12). Indeed, Peterson et al teach the use of rubber bands in place of the belts (column 2, line 37). These pliable rubber belts would naturally conform to the meat product as the meat product traveled through the spaces between the pressing rollers (Figure 1, #5 & 11) and pushed the belts outward as the meat tried to expand back to its non-pressed thickness. Finally, the upper and lower belts of Peterson et al certainly "at least partially" surrounded the meat products by enclosing them from both above and below (Figure 1, #6 & 12).

Applicant argues that the device of Peterson et al must resist conformation.

However, the only portions of Peterson et al which are rigid and inflexible are the rollers themselves (column 3, line 11). The rubber belts therefore must be pliable in order to (Figure 1, #6 & 12). Indeed, Peterson et al teach the use of rubber bands in place of the belts (column 2, line 37). These pliable rubber bands would naturally conform to the meat product as the meat product traveled through the spaces between the pressing rollers

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wrap around these rigid rollers and would naturally conform to the meat product as it tried to expand in the spaces between the rollers where no pressing occurs.

Appellant argues that the belts of Peterson et al are not pliable, or conformable, because they can be reinforced. However, reinforced materials can still be pliable and conformable. The belts are clearly pliable because they can be wrapped around the rollers. The belts are also conformable because they naturally conform to the meat product as it tries to expand between the rollers. The reinforcement of Peterson et al was merely for the purpose of preventing the soft rubber from tearing under the stress of being stretched. Peterson et al specifically mention stretching of the belts as being a potential problem in the following paragraph (column 2, lines 40-42).

Argument 1.1

Appellant argues that the belts of Peterson et al did not "conform" to the food and "at least partially" surround it. However, the belts of Peterson et al were made from materials such as rubber and plastic which were clearly pliable because the belts are wrapped around rollers for repeated use (Figure 1, #6 & 12). Indeed, Peterson et al teach the use of rubber bands in place of belts (column 2, line 37). These pliable rubber belts would naturally conform to the meat product as the meat product traveled through the spaces between the pressing rollers (Figure 1, #5 & 11) and pushed the belts outward as the meat tried to expand back to its non-pressed thickness. Finally, the upper and lower belts of Peterson et al certainly "at least partially" surrounded the meat products by enclosing them from both above and below (Figure 1, #6 & 12).

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Argument 1.2

Appellant argues that Peterson et al teach only a single application of pressure. However, Peterson et al clearly illustrate plural rollers which pressed the meat several times (Figure 1, #5 & 11).

Argument 2.0

The rejection based upon Klaasen has been dropped because it does not add anything beyond that which is taught by the other references, specifically Peterson et al. This is done in order to reduce the number of issues before the Board.

Argument 3.0

Appellant argues that the belts of Peterson et al were not "pliable", did not "conform" to the food, and did not "at least partially" surround the food item. However, this is clearly not the case. Pliable is defined as "supple enough to bend freely or repeatedly without breaking" [Merriam Webster's Collegiate Dictionary, 10th Edition]. The belts of Peterson et al were made from materials such as rubber and plastic which were clearly pliable because the belts are wrapped around rollers for repeated use (Figure 1, #6 & 12). Indeed, Peterson et al teach the use of rubber bands in place of belts (column 2, line 37). These pliable rubber belts would naturally conform to the meat product as the meat product traveled through the spaces between the pressing rollers (Figure 1, #5 & 11) and pushed the belts outward as the meat tried to expand back to "conform" to the food, and did not just teach a belt which surrounded the food item. However, this is clearly not the case. Pliable is defined as "supple enough to bend freely or

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its non-pressed thickness. Finally, the upper and lower belts of Peterson et al certainly "at least partially" surrounded the meat products by enclosing them from both above and below (Figure 1, #6 & 12).

Appellant argues that Margolis teaches away from Peterson et al because Margolis wishes to remove fats and oils prior to further processing. However, Margolis is the primary reference and Margolis required a means for pressing, preferably a roller (column 4, lines 52-63). Peterson et al teach a means for pressing meat with rollers (Figure 1). Essentially, Peterson et al teach an automated method for tenderizing meat products by gradually pressing them between successively closer rollers and pliable belts. It would have been obvious to one of ordinary skill in the art to incorporate the pliable belts and rollers of Peterson et al into the invention of Margolis since both are directed to methods of pressing meat, since Margolis already included a pressing step which could be carried out by any means which was economical and efficient (column 4, line 52) and rollers in particular (column 4, line 58); since the automated belts and rollers of Peterson et al would have provided a more economical and efficient means for pressing as compared to the manual roller pressing of Margolis, and since the plural rollers of Peterson et al would have provided multiple presses and thus forced the heated meat of Margolis to exude more juices as compared to a single pressing step.

In response to applicant's argument that Peterson et al pressed a frozen meat rather than a heated meat, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference, nor is it that the claimed invention must be expressly suggested in any one or which could be carried out by any means which was economical and efficient (column 4 line 52) and rollers in particular (column 4, line 58), and the automated belts and

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all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). In this case, the system of Margolis required a means for pressing the meat, preferably a roller device (column 4, lines 52-63).

Peterson et al teach an automated meat pressing device comprised of a plurality of rollers and belts. It would have been obvious to one of ordinary skill in the art to incorporate the automated meat press of Peterson et al into the invention of Margolis since both are directed to methods of pressing meat, since Margolis already included a pressing step which could be carried out by any means which was economical and efficient (column 4, line 52) and rollers in particular (column 4, line 58), since the automated belts and rollers of Peterson et al would have provided a more economical and efficient means for pressing as compared to the manual roller pressing of Margolis, and since the plural rollers of Peterson et al would have provided multiple presses and thus forced the heated meat of Margolis to exude more juices as compared to a single manual pressing step.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Appellant argues that Peterson et al teach "mangling" while Margolis teaches retaining its shape. However, the term "mangling" in Peterson et al was simply used as

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a synonym for rolling, pressing, or tenderizing. Further, the reason for the size reduction in Peterson et al was the fact that the meat was frozen. The primary reference of Margolis required heating. Therefore the heated meat of Margolis, when pressed by the device of Peterson et al, would also have kept its shape.

Appellant argues that Peterson et al teach retention of juices. However, the reason for Peterson et al retaining juices is that the meat is frozen. The primary reference, Margolis, requires that the meat be in a heated state when it is pressed. Therefore, when incorporating the pressing device of Peterson et al into the invention of Margolis the pressed meat would naturally exude juices, as required by Margolis, due to its having been heated.

Appellant argues that Peterson et al used a much higher pressure than Margolis. However, appellant has not provided any evidence in disclosure of Peterson et al to back up this assertion. Peterson et al simply do not state what level of pressure is produced. Indeed, Margolis teaches that a roller device was a preferable means for pressing the meat (column 4, line 58).

Applicant argues that Peterson et al did not teach a sloped or perforated surface. However, this is merely a "preferred" embodiment of Margolis, rather than a requirement (column 5, lines 26-41). Regardless, one of ordinary skill in the art would have easily been capable of adapting the pressing device of Peterson et al to use a slanted or perforated surface.

Appellant argues that Peterson et al used a much higher pressure than Margolis.

Argument 3.1

Back up this assertion. Peterson et al may not state what level of pressure is produced. Indeed, Margolis teaches that a roller device was a preferable means for pressing the meat.

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Appellant did not provide any further arguments.

Argument 3.2

Appellant did not provide any further arguments.

Argument 3.3

Appellant argues that none of the references teach infusing a liquid after the food has been pressed. However, Margolis clearly teach a liquid infusion step following the pressing step (column 4, lines 52-62; column 5, lines 50-68).

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Argument 3.4

Appellant argues that none of the references teach a surface thickness of at least $\frac{1}{2}$ ". However, it would have been obvious to one of ordinary skill in the art to provide belts at least $\frac{1}{2}$ " thick in the method of Peterson et al since belts were commonly made in this thickness, since Peterson et al simply did not state the thickness of the belts, and since a thick belt would have provided added durability and a longer service life. MPEP 2144.04 states: In re Rose, 220 F.2d 459, 105 USPQ-237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" where held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.); In re Rinehart, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976) ("mere scaling up of a prior art process capable of being scaled up, if not. However, it not it have been known to one of ordinary skill in the art to provide belts at least $\frac{1}{2}$ " thick in the method of Peterson et al since belts were commonly made in this thickness, since Peterson et al simply did not state the thickness of the

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such were the case, would not establish patentability in a claim to an old process so scaled." 531 F.2d at 1053, 189 USPQ at 148.). In *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Arguments 4.0 & 5.0

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The rejections of claims 4-5 and 30 have been dropped, as further discussed above. These claims are now objected to as being dependent upon rejected claims.

Argument 6.0

Appellant argues that none of the references teach impacting the food during infusion. However, Gould teaches a method of treating meat by infusing it with liquid while impacting it with spiral flites (Figure 1, #24). It would have been obvious to one of ordinary skill in the art to incorporate the spiral flites of Gould into the invention of Margolis, in view of Peterson et al, since all are directed to methods of treating meat, since Margolis teaches using any means for infusion (column 6, line 5) such as dipping (column 6, line 16), since the device of Gould essentially dipped the meat into a pool of infusion liquid when it is rotated (Figure 1, #63), and since the spiral flites of Gould

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provided advantages such as minimal bruising, uniform color and brine uptake, as well as minimal time requirements (column 2, line 62 to column 3, line 21).

In response to applicant's argument that Margolis does specifically mention impacting, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208

USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

may be bodily incorporated into the structure of the primary reference; nor is it that the

Argument 7.0

Appellant argues that none of the references teach a rotating paddle, or the paddle rotating in a direction opposite of the spiral flites. However, Ludwig clearly teaches a method of infusing meat with rotating paddles (Figure 6, #57) and the paddles operating in either direction (abstract). It would have been obvious to one of ordinary skill in the art to incorporate the paddles of Ludwig into the invention of Margolis, in view of Peterson et al and Gould, since all are directed to methods of treating meat, since

USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir.

1986).

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Margolis teaches using any means for infusion (column 6, line 5), since Gould already included spiral flites rotating in one direction (Figure 1, #24), since the paddles of Ludwig could be moved in either direction (abstract), since operating the paddles in the opposite direction would have provided added impacts to the meat, and since the reversible paddles of Ludwig provided a convenient means for emptying the vessel (abstract).

In response to applicant's argument that a single reference does not teach all of the claim limitations, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981).

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Argument 8.0

Appellant argues that the references do not teach a submerged conveyor. However, Nordin clearly teaches a method of infusing meat by using a submerged

cannot show nonobviousness by attacking references individually where the rejections

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conveyor (Figure 1, #14 & 16) and several times more liquid than meat (Figure 1, #8 & 10). It would have been obvious to one of ordinary skill in the art to incorporate the submerged conveyor of Nordin into the invention of Margolis, in view of Peterson et al, since all are directed to methods of treating meat, since Margolis teaches using any means for infusion (column 6, line 5), and since the submerged conveyor of Nordin provided more even distribution of liquid and quicker curing time (column 1, lines 56-60).

Argument 9.0 Control Number: 09/909,913

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In response to appellant's argument that the fingers of GB 957356 cannot be used in a submerged state, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). Nordin teaches impacting a submerged meat product with fingers (Figure 2, #18). GB 957356 teaches impacting meat with flexible fingers (Figure 4, #5). It would have been obvious to one of ordinary skill in the art to incorporate the flexible fingers of GB 957356 into the invention of Margolis, in view of Peterson et al and Nordin, since all are directed to methods of treating meat, since Margolis teaches using any means for infusion (column 6, line 5), since Nordin already included impacting fingers (Figure 1, #18), since flexible fingers would be less likely to rupture the meat product, and since the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d

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break off in the meat if an obstruction is encountered, and since GB 957356 teaches that flexible fingers were more effective than stiff fingers (page 1, lines 26-75).


Appellant argues that the flexible fingers of GB 957356 would be ineffective when submerged. However, GB 957356 is being used in conjunction with Nordin, therefore both references must be considered. Nordin does not state what material was used for making the fingers (Figure 4, #18). It would have been obvious to one of ordinary skill in the art to make the fingers of Nordin flexible, in view of GB 957356, since flexible fingers would bend more easily and thereby avoid breaking off in the meat if they encounter a bone or some other obstruction.

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For the above reasons, it is believed that the rejections should be sustained.

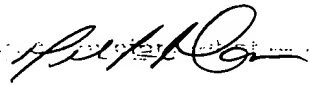
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